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No.

In The

Supreme Court of the United States

October Term, 1995

AMY FRIEDMAN,

Petitioner,

vs.

FIDELITY BROKERAGE SERVICES, INC., and other Fidelity entities, real names unknown; FIDELITY SERVICE CORPORATION; NATIONAL FINANCIAL SERVICES CORPORATION,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

New York has a statute which absolves a garnishee from liability for the delivery of property or the payment of money to a judgment creditor.

Whether the Due Process Clause of the Fourteenth Amendment precludes the New York statute from relieving a national brokerage firm from liability for its unauthorized liquidation of the assets held in Massachusetts in its Florida customer's investment accounts and its delivery of the proceeds to the New York Tax Department in response to tax levies served upon its New York branch office.

Whether the New York statute (New York Civil Practice Law & Rules § 5209 McKinney 1978) exonerates the Respondents from Liability for the tort of conversion committed in Massachusetts.

LISTING OF PARENT COMPANIES

Respondent, Fidelity Service Corporation, a/k/a Fidelity Service Company is a division of FMR Corporation and Respondents Fidelity Brokerage Services, Inc. and National Financial Services Corporation are direct or indirect subsidiaries of FMR Corporation. FMR Corporation, with its divisions and subsidiaries, does business under the trade name "Fidelity Investments".

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I. The lower court's ruling allows a creditor or claimant to issue nationwide garnishments or attachments against investment accounts located in other states or overseas merely by serving a broker's New York branch office regardless of where the account is located or where the debtor resides or the debtor's lack of contacts with the State of New York.	4

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Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Amy Friedman, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals (App., *infra,* 1a) is reported at 1995 U.S. App. Lexis 10163.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 8, 1995. Petitioner's Suggestion for Rehearing En Banc was denied on June 16, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law.

STATUTE INVOLVED

New York Civil Practice Law & Rules § 5209 (McKinney 1978) provides in pertinent part:

> A person who, pursuant to an execution or order, pays or delivers, to the judgment creditor . . . money or other personal property in which a judgment debtor has or will have an interest, or so pays a debt he owes the judgment debtor, is discharged from his obligation to the judgment debtor to the extent of the payment or delivery.

STATEMENT OF THE CASE

In June of 1986, Hershel Krasnow (Petitioner's assignor), a Florida resident, opened an account with Fidelity at its Boston, Massachusetts offices and from time to time thereafter forwarded substantial sums of money to Fidelity's Boston offices for credit to his retirement account and investment in various Fidelity funds.

In October, 1991, the New York State Department of Taxation and Finance sought to enforce a long-disputed tax liability against Mr. Krasnow and his former wife for allegedly unpaid New York State taxes (which had been assessed some twenty (20) years earlier in the years 1968-1971) through the issuance of "Tax Compliance Levies". These Levies were served in the State of New York upon National Financial Services Corp., an agent and affiliate of Fidelity, and upon Fidelity Investments (a trade name). Despite Krasnow's objections, Respondents liquidated his Boston accounts and delivered the proceeds to the New York Tax Department.

A. Course of Proceedings

Petitioner, being the assignee of Hershel Krasnow, instituted this action against the Respondents in the District Court of Douglas County, Nebraska for conversion of Krasnow's property in the sum of $300,743.56. Respondents removed the action to the United States District Court of Nebraska pursuant to 28 U.S.C. § 1445(b) based upon diversity jurisdiction under 28 U.S.C. § 1332.

Respondents filed Motions for Judgment on the Pleadings under Rules 12(c) and 19 asserting that they are protected from liability by virtue of New York Civil Practice Law & Rules § 5209 (McKinney 1978). The District Court granted Respondents'

Motions for Judgment on the Pleadings and dismissed the action (App., *infra*, 5a).

Petitioner appealed to the Eighth Circuit Court of Appeals which affirmed the dismissal of Petitioner's action on the basis that the New York statute provides Respondents with a complete defense to liability (App., *infra*, 1a).

REASONS FOR GRANTING THE WRIT

I.

THE LOWER COURT'S RULING ALLOWS A CREDITOR OR CLAIMANT TO ISSUE NATIONWIDE GARNISHMENTS OR ATTACHMENTS AGAINST INVESTMENT ACCOUNTS LOCATED IN OTHER STATES OR OVERSEAS MERELY BY SERVING A BROKER'S NEW YORK BRANCH OFFICE REGARDLESS OF WHERE THE ACCOUNT IS LOCATED OR WHERE THE DEBTOR RESIDES OR THE DEBTOR'S LACK OF CONTACTS WITH THE STATE OF NEW YORK.

The Court of Appeals' application of the New York statute to exonerate the Respondents from their Massachusetts conversion violates Petitioner's right to due process. As clearly noted by this Court in *Shaffer v. Heitner,* 433 U.S. 186 (1977) overruling *Harris v. Balk,* 198 U.S. 215 (1905), whether or not a state can assert its jurisdiction over a nonresident or his property is subject to the fairness standard of *International Shoe Co. v. Washington,* 326 U.S. 310. In *Shaffer,* the plaintiff sued Greyhound Bus Line's board of directors in Delaware and garnished their stock to compel their appearance in a Delaware action. The Delaware statute provided that all stock of Delaware companies has situs in Delaware and could be garnished and forfeited if the defendants

did not appear in the Delaware action. The Court concluded that the Greyhound defendants could not be compelled to appear in the Delaware action unless the defendants had other contacts with Delaware sufficient to justify hauling the defendants into court there. Giving effect to the New York statute forces the Petitioner to challenge the tax levies in New York whether or not New York had personal jurisdiction over the Petitioner. This is precisely the unfair result struck down in *Shaffer.* To permit the New York Tax Department to seize a Florida citizen's retirement investment accounts held in Massachusetts by serving a tax levy upon a national brokerage firm's New York branch office does not comport with due process and opens the door to extending in rem and in personam jurisdiction without limitation.

II.

INVESTMENT ACCOUNTS HELD IN MASSACHUSETTS DO NOT CONSTITUTE "PERSONAL PROPERTY" HAVING A SITUS IN NEW YORK SUBJECT TO LEVY.

The precise issue as to whether Krasnow's Massachusetts out-of-state investment accounts were subject to levy in New York was decided by the Supreme Judicial Court of Massachusetts in *Prudential-Bache Securities, Inc, v. Commissioner of Revenue,* 588 N.E. 2d 639 (Mass. 1992), holding that a Massachusetts tax levy served in Massachusetts upon Prudential-Bache did not authorize Prudential-Bache to liquidate its customers' accounts located at its Illinois office and that the Illinois account did not constitute property or a right to property in Massachusetts. The Massachusetts Court recognized that authorizing such a levy based upon a taxpayer's right to ask Prudential in Massachusetts to make a transaction as to the assets in his Illinois investment account would raise due process problems under the Fourteenth Amendment *citing Shaffer v. Heitner, supra.*

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED MAY 8, 1995

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 94-3433NE

AMY FRIEDMAN,

Appellant,

vs.

FIDELITY BROKERAGE SERVICES, INC., et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA.

[PUBLISHED]

Submitted: May 4,1995

Filed: May 8, 1995

Before FAGG, MAGILL, and BEAM, Circuit Judges.

PER CURIAM.

Amy Friedman appeals the district court's judgment on the pleadings in her action to recover funds that Fidelity Investments turned over to the State of New York according to a tax levy. Friedman argues Fidelity should not have honored the levy

because the funds it turned over were located in a Massachusetts account and not "within the jurisdiction of the State of New York." Having carefully considered Friedman's claims, we agree with the district court that her jurisdictional arguments are misplaced and that New York Civil Practice Law and Rules § 5209 (McKinney 1978) provides defendants with a complete defense to liability. Accordingly, we affirm. *See* 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED MAY 8, 1995

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3433NEO

AMY FRIEDMAN,

Appellant,

vs.

FIDELITY BROKERAGE SERVICES, INC., et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 8, 1995

A true copy.

Appendix B

ATTEST: Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

MANDATE ISSUED
June 25, 1995

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA DATED SEPTEMBER 15, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

8:CV93-616

AMY FRIEDMAN,

Plaintiff,

vs.

FIDELITY SERVICE CORPORATION, FIDELITY BROKERAGE SERVICES, INC., and other Fidelity entities, real names unknown,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER IS before the Court on the defendants' motion for judgment on the pleadings and for joinder of an indispensable party, pursuant to Fed. R. Civ. P. 12 (c) and 19, (filing no. 22)

The defendants have submitted additional evidence in the form of numerous affidavits and the parties have stipulated that if the Court treats the motion as one for summary judgment the plaintiff may also submit additional evidence in opposition to the motion for summary judgment. The Court finds that this is unnecessary and will rule on the motion for judgment on the pleadings. The Court finds that the motion for judgment on the

pleadings and for joinder of an indispensable party should be granted.

The plaintiff, Amy Friedman., is the assignee of Hershel Krasnow. In 1986, Krasnow opened a Fidelity USA Ultra Service Account and Brokerage Account with the defendants and kept investing substantial sums of money in various Fidelity funds. The New York State Department of Taxation and Finance served Tax Compliance Levies in New York on Fidelity Investments and National Financial Services Corporation, a wholly owned subsidiary of Fidelity Brokerage, against Krasnow's assets. Fidelity liquidated Krasnow's accounts between October 22, 1991, and November 5, 1991, and delivered a total of $300,743.56 in proceeds to the New York State Department of Taxation and Finance, pursuant to the levies. Fidelity also cancelled Krasnow's attempt to purchase additional shares of a Fidelity fund. National Financial serves as the clearing broker for Fidelity brokerage accounts and handles all back office operations for the accounts. Its principal place of business is New York City, New York.

In considering a motion for judgment on the pleadings brought pursuant to Federal Rule of Civil Procedure 12 (c), the court must view the facts presented in the pleadings and the reasonable inferences to be drawn therefrom in a light most favorable to the nonmoving party. The well-pleaded factual allegations in the nonmovant's pleadings are assumed to be true, and all contravening assertions in the movant's pleadings are assumed to be false. 5A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1368 (2d ed. 1990).

The defendants assert that they are protected from liability by New York's discharge statute, N.Y. Civ. Prac. L. & R. § 5209

(McKinney 1978). Section 5209 discharges a garnishee from any liability to a judgment debtor for honoring a post-judgment levy. Section 5209 provides:

> pays or delivers, to the judgment creditor or a sheriff or receiver, money or other personal property in which a judgment debtor has or will have an interest, or so pays a debt he owes the judgment debtor, is discharged from his obligation to the judgment debtor to the extent of the payment or delivery.

Id. The discharge statute provides unconditional protection against double liability for garnishees who honor levies. The purpose of this provision is to protect a garnishee who delivers property pursuant to an execution against a subsequent claim by the judgment debtor for the same property. The validity and effect of the tax compliance levies are governed by the law of the forum in which they are issued. *Openheimer v. Dresdner Bank A G.*, 377 N.Y.S.2d 625, 631 (N.Y. App. Div.), *aff'd,* 394 N.Y.S.2d 634 (1977). New York protects a garnishee by section 5209. The defendants honored the levies and they are protected by section 5209 from double liability.

The plaintiff argues that the defendants should have filed a declaratory judgment or interpleader action to determine who was entitled to the proceeds. New York law, however, does not require that a garnishee file an action before honoring the levies. It is the judgment debtor's obligation to take action once he or she is notified of the levies. The plaintiff also argues that the situs of the property was not in New York but in Massachusetts. Once the levies were honored the situs of the property was no longer an issue because section 5209 protects the defendants from liability.

Appendix C

The defendants assert that National Financial is an indispensable party which should be joined as a defendant, pursuant to Rule 19. National Financial was served with one of the tax levies at issue and it had custody of the securities in Krasnow's brokerage account. It delivered $198,157.65 in proceeds to the New York State Department of Taxation and Finance.

National Financial should be joined as a party under Rule 19 so complete relief can be accorded to all of the parties. The Court's ruling on the motion for judgment on the pleadings also applies to National Financial.

IT IS ORDERED:

1. the defendants' motion for judgment on the pleadings and for joinder of an indispensable party, (filing no. 22), is granted;

2. the parties, stipulation regarding extending the discovery deadlines, (filing no. 32), is denied as moot; and

3. this action is dismissed.

Dated this 15th day of September, 1994.

BY THE COURT:

William G. Cambridge
United States District Court

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA DATED SEPTEMBER 15, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

8:CV93-616

AMY FRIEDMAN,

Plaintiff,

vs.

FIDELITY SERVICE CORPORATION, FIDELITY BROKERAGE SERVICES, INC., and other Fidelity entities, real names unknown,

Defendants.

In accordance with the memorandum and order entered herein on this date,

IT IS ORDERED that this action is dismissed with prejudice, each party to pay its own costs.

DATED this 15th day of September, 1994.

BY THE COURT:

William G. Cambridge
United States District Court